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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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STEVEN FLOYD VOSS,

Plaintiff,

3:14-cv-00066-RCJ-WGC

**REPORT & RECOMMENDATION OF  
U.S. MAGISTRATE JUDGE**

v.

ISIDRO BACA, et. al.,

Defendants.

This Report and Recommendation is made to the Honorable Robert C. Jones, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4. Before the court is Plaintiff's Motion for Partial Summary Judgment (Doc. # 39)<sup>1</sup>, to which Defendants filed an Opposition (Doc. # 73) and Cross-Motion to Dismiss Plaintiff's ADA and RA Claims (Doc. # 74).<sup>2</sup> Plaintiff filed a reply in support of his motion (Doc. # 83) as well as a response to Defendants' cross-motion (Doc. # 85). Defendants filed a reply in support of their cross-motion. (Doc. # 89.)

Also before the court is Defendants' Motion for Summary Judgment as to Counts III and IV of Plaintiff's Complaint. (Doc. # 117.) Plaintiff filed a response to this motion (Doc. # 126) and Defendants filed a reply (Doc. # 127)

After a thorough review, the court recommends that: (1) Plaintiff's Motion for Partial Summary Judgment (Doc. # 39) be denied; (2) Defendants' Cross-Motion to Dismiss Plaintiff's

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<sup>1</sup> Refers to court's docket number.

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<sup>2</sup> Docs. # 73 and # 74 are identical, but were docketed separately to reflect that Defendants filed both an opposition to Plaintiff's motion as well as their own cross-motion to dismiss.

1 ADA and RA Claims (Doc. # 74) be denied; and (3) Defendants' Motion for Summary  
 2 Judgment as to Counts III and IV (Doc. # 117) be granted.

3 **I. BACKGROUND**

4 **A. Parties and Claims**

5 Plaintiff, a pro se litigant, is a prisoner in the custody of the Nevada Department of  
 6 Corrections (NDOC), and brings this action pursuant to 42 U.S.C. § 1983, the Americans with  
 7 Disabilities Act (ADA), 42 U.S.C. § 12131, *et. seq.*, and the Rehabilitation Act (RA), 29 U.S.C.  
 8 § 794. (Pl.'s Compl., Doc. # 20.) The events giving rise to this action took place while Plaintiff  
 9 was housed at the Northern Nevada Correctional Center (NNCC). (*Id.*) Defendants are NDOC  
 10 Director Greg Cox, NDOC Deputy Director E.K. McDaniel, NNCC Warden Isidro Baca, NNCC  
 11 Associate Warden Ron Schreckengost, NNCC Associate Warden Lisa Walsh, NNCC  
 12 Correctional Case Specialist II William Humphrey, NNCC Correctional Case Specialist II  
 13 Shannon Moyle, and Monica Navarro. (Doc. # 20 at 2-3; Screening Order, Doc. # 19.)

14 On screening, Plaintiff was allowed to proceed with the following claims: (1) claims for  
 15 violation of the ADA and RA in Count I against Cox, McDaniel, Baca, Shreckengost, Walsh and  
 16 Moyle; (2) a retaliation claim in Count II against defendants Humphrey, Walsh, Navarro, and  
 17 Moyle; (3) a claim for denial of access to the courts in Count III against defendants Walsh,  
 18 Navarro, Baca and McDaniel; and (4) an access to courts claim against defendant Humphrey in  
 19 Count IV. (Doc. # 19 at 3-7.)

20 The court dismissed with prejudice Plaintiff's Fourteenth Amendment due process claim  
 21 in Count I, and Count V was dismissed as duplicative of Counts III and IV. (Doc. # 19 at 4-5, 7-  
 22 8.)

23 In Count I, Plaintiff alleges that on March 4, 2013, NNCC initiated the institutional level  
 24 system (governed by Operational Procedure (OP) 516), consisting of three levels. (Doc. # 20 at  
 25 5-6.) Plaintiff claims he has a qualified disability within the meaning of the ADA, and that his  
 26 medical records demonstrate that he is regarded as having such disability. (*Id.* at 6.) He alleges  
 27 that his medical classification and medical restrictions render him ineligible for any prison work  
 28 assignment within NDOC, which systematically precludes him from advancing within the

1 institutional levels. (*Id.* at 6) He avers that he can never advance to level one status and benefit  
 2 from the programs, activities, benefits and privileges enjoyed by level one's inmates because a  
 3 prerequisite to level one status is the ability to hold a work assignment. (*Id.* at 6-7.) He avers that  
 4 these benefits and privileges include exercise facilities, hobby craft, a music program, and the  
 5 inmate coffee shop. (*Id.* at 8.) He also mentions that his conviction which resulted in his  
 6 confinement within NDOC does not impose any work requirement; therefore, NDOC may not  
 7 impose such a requirement upon him. (*Id.* at 9.)

8 In Count II, Plaintiff alleges that prison officials changed his housing assignment from  
 9 Unit 10-B to Unit 2-C in anticipation of the implementation of the institutional level system. (*Id.*  
 10 at 10.) On March 4, 2013, when NNCC implemented the system, Unit 10 was converted into a  
 11 level one housing unit, and Unit 2 was converted to a level three housing unit. (*Id.*) Plaintiff was  
 12 assigned to level three; then, on July 25, 2013, Unit 2 was upgraded to level two status along  
 13 with Plaintiff. (*Id.*) Plaintiff was then assigned to level three again on September 10, 2013. (*Id.* at  
 14 11.) He asserts that this occurred after he had a meeting with Walsh and Navarro, who had  
 15 assured him that he would not receive a level reduction absent a write-up. (*Id.*) Plaintiff did not  
 16 receive a write-up but nevertheless had his level reduced. Plaintiff alleges the level reduction was  
 17 retaliatory because he had filed grievances (2006-29-58159 and 2006-29-670049) challenging  
 18 the institutional level system, and alleging that Humphrey had inappropriately approached him  
 19 about a grievance alleging misconduct against Humphrey. (*Id.* at 11-12.) Plaintiff had reported  
 20 this incident to Walsh, who assured Plaintiff there would be no retaliation. (*Id.* at 12.)  
 21 Nonetheless, the incident was brought to the attention of Humphrey's supervisor, Moyle, who  
 22 had admonished Plaintiff regarding his comments. (*Id.* at 12.13.) As indicated above, the court  
 23 construed this as stating a retaliation claim against Walsh, Navarro and Moyle.

24 In Count III, Plaintiff alleges that he submitted a grievance on March 5, 2013, and on  
 25 March 27, 2013, Walsh returned the grievance to Plaintiff as improper because Plaintiff did not  
 26 attach proof of his attempts to informally resolve his grievance claims with his caseworker. (*Id.*  
 27 at 17.) He resubmitted the grievance with proof of his efforts to informally resolve the issue, and  
 28 a response should have been forthcoming by May 10, 2013. (*Id.*) He did not receive a response

1 by May 10, 2013, and so he submitted his first level grievance on that date, with a response due  
 2 by June 24, 2013. (*Id.* at 17-18) On May 21, 2013, Plaintiff received a response to the  
 3 resubmitted informal level grievance. (*Id.* at 18.) Plaintiff informed the responder that because  
 4 the response was overdue, he had already sent in his first level grievance, and the caseworker  
 5 instructed Plaintiff to resubmit the first level grievance, which he did. (*Id.*) Plaintiff claims that  
 6 this did not extend the time for them to respond to the initially-submitted first level grievance,  
 7 but he nevertheless waited until July 10, 2013 to submit his second and final level grievance. (*Id.*  
 8 at 19.) On August 19, 2013, his first level grievance was returned as improper, asserting that  
 9 Plaintiff failed to attach his informal level grievance response. (*Id.*) The second level grievance  
 10 was also returned as improper on the basis that the first level grievance has been returned as  
 11 improper. (*Id.* at 19-20.) On August 22, 2013, Plaintiff re-submitted the first level grievance to  
 12 Walsh during a conference with her and Monica Navarro. (*Id.* at 20.)

13 Plaintiff avers that Walsh and Navarro told him that they were intentionally delaying the  
 14 grievance process for claims involving the institutional level system because they were trying to  
 15 “iron-out wrinkles in the level system.” (*Id.*) Plaintiff alleges that this delay impeded his ability  
 16 to exhaust his administrative remedies and file a claim. (*Id.*)

17 In Count IV, Plaintiff alleges that on August 20, 2013, prior to submitting his informal  
 18 level grievance (number 2006-29-67049), he attempted to informally resolve his claims with his  
 19 caseworker, defendant Humphrey, to attach to his informal level grievance. (*Id.* at 24.) He claims  
 20 that he gave Humphrey an inmate request form where he asked Humphrey to acknowledge his  
 21 attempts to informally resolve his claims, but Humphrey refused to provide this  
 22 acknowledgement. (*Id.* at 24-25.) Humphrey admitted Plaintiff could not have his grievance  
 23 accepted without proof of trying to informally resolve the issues, and that Plaintiff had to exhaust  
 24 his administrative remedies prior to filing suit. (*Id.* at 25.)

25 **B. Plaintiff’s Motion for Partial Summary Judgment Re: Claims I and III (Doc. # 39)**

26 Plaintiff moves for partial summary judgment as to his claims in Counts I and III.  
 27 (Doc. # 39.) First, Plaintiff asserts that his medical records demonstrate that he is a person with a  
 28 qualified disability or is regarded as having a qualified disability by NDOC insofar as his claims

1 under the ADA and RA are concerned. (Doc. # 39 at 20-21, 38.) He contends that due to his  
 2 medical classification, he is ineligible for any work assignment within NDOC which precludes  
 3 him from advancing to level one status and enjoying the benefits afforded to level one inmates.  
 4 (*Id.* at 21, 39.) Second, with respect to Count III, he argues that he has sufficiently exhausted his  
 5 administrative remedies and is entitled to summary judgment on this issue. (*Id.* at 28-36, 41-57.)

6 **C. Defendants' Response and Cross-Motion to Dismiss Plaintiff's ADA & RA Claims**  
 7 **(Docs. # 73/74)**

8 Defendants oppose Plaintiff's partial motion for summary judgment, and move to dismiss  
 9 Plaintiff's ADA and RA claims. (Docs. # 73/74.) In response to Plaintiff's motion, Defendants  
 10 dispute that Plaintiff cannot work due to his medical classification. With respect to Count III,  
 11 Defendants acknowledge that Plaintiff exhausted his administrative remedies as to his ADA and  
 12 RA claims, but argue that at a minimum, a genuine dispute of material fact exists as to whether  
 13 Plaintiff suffered actual injury because he was able to file this lawsuit within the statute of  
 14 limitations. Finally, they argue that Walsh did not abuse the grievance process.

15 In their cross-motion to dismiss Plaintiff's ADA and RA claims, Defendants argue that  
 16 Plaintiff lacks standing to bring these claims because Plaintiff does not have a qualified disability  
 17 under the ADA and RA. They contend that Plaintiff has three documented medical conditions:  
 18 (1) type 2 diabetes; (2) hypertension; and (3) a congenital heart condition. They argue that none  
 19 of these conditions substantially limit one or more of Plaintiff's major life activities so as to  
 20 qualify as a disability under the ADA.

21 Next, they argue that to the extent Plaintiff alleges employment discrimination under  
 22 Title I of the ADA, he did not exhaust his administrative remedies with the Equal Employment  
 23 Opportunity Commission (EEOC) prior to commencing this lawsuit. (*Id.* at 13-14.) Insofar as  
 24 Plaintiff is proceeding under Title II of the ADA, Defendants argue that he was not denied  
 25 advancement to level one status solely because of his disability as he was denied level one status  
 26 for several reasons, including that he did not take advantage of programming, educational or  
 27 work opportunities. (*Id.* at 15.) They go on to argue that Plaintiff's inability to work is his own  
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1 decision, so it cannot be said that the prison did not give him a job and preclude his advancement  
 2 to level one status because of his disability. (*Id.*)

3 **D. Defendants' Motion for Summary Judgment-Counts III and IV**

4 In their motion for summary judgment as to Counts III and IV, Defendants argue that  
 5 Plaintiff has failed to show any actual injury relative to the alleged actions regarding his  
 6 grievances. With respect to his grievance addressing the institutional level system, grievance  
 7 2006-29-58159, Defendants assert that Plaintiff was able to timely file this action as to that claim  
 8 so he did not suffer any actual injury as a result of any delays in responding to his grievance.  
 9 (Doc. # 117 at 5-7.) As for his grievance that addressed an alleged abuse of the grievance  
 10 process, Defendants assert that Plaintiff simply stopped trying after his grievance was rejected as  
 11 improper at the informal level for containing multiple issues. (*Id.* at 6-7.) They further contend  
 12 that McDaniel did not personally participate in the conduct giving rise to these claims. (*Id.* at 7.)  
 13 Finally, they argue that Plaintiff failed to exhaust his administrative remedies regarding the  
 14 claims asserted in Counts III and IV, as he never took grievance 2006-29-67049 past the  
 15 informal level. (*Id.* at 9.)

16 **II. SUMMARY JUDGMENT STANDARD**

17 "The purpose of summary judgment is to avoid unnecessary trials when there is no  
 18 dispute as to the facts before the court." *Northwest Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18  
 19 F.3d 1468, 1471 (9th Cir. 1994) (citation omitted). In considering a motion for summary  
 20 judgment, all reasonable inferences are drawn in favor of the non-moving party. *In re Slatkin*,  
 21 525 F.3d 805, 810 (9th Cir. 2008) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255  
 22 (1986)). "The court shall grant summary judgment if the movant shows that there is no genuine  
 23 dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R.  
 24 Civ. P. 56(a). On the other hand, where reasonable minds could differ on the material facts at  
 25 issue, summary judgment is not appropriate. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,  
 26 250 (1986).

27 A party asserting that a fact cannot be or is genuinely disputed must support the  
 28 assertion by:

(A) citing to particular parts of materials in the record, including depositions,  
 documents, electronically stored information, affidavits or declarations,

1 stipulations (including those made for purposes of the motion only), admissions,  
 2 interrogatory answers, or other materials; or

3 (B) showing that the materials cited do not establish the absence or presence of a  
 4 genuine dispute, or that an adverse party cannot produce admissible evidence to  
 5 support the fact.

6 Fed. R. Civ. P. 56(c)(1)(A), (B).

7 If a party relies on an affidavit or declaration to support or oppose a motion, it "must be  
 8 made on personal knowledge, set out facts that would be admissible in evidence, and show that  
 9 the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4).

10 In evaluating whether or not summary judgment is appropriate, three steps are necessary:  
 11 (1) determining whether a fact is material; (2) determining whether there is a genuine dispute as  
 12 to a material fact; and (3) considering the evidence in light of the appropriate standard of proof.  
 13 See *Anderson*, 477 U.S. at 248-250. As to materiality, only disputes over facts that might affect  
 14 the outcome of the suit under the governing law will properly preclude the entry of summary  
 15 judgment; factual disputes which are irrelevant or unnecessary will not be considered. *Id.* at 248.

16 In deciding a motion for summary judgment, the court applies a burden-shifting analysis.  
 17 "When the party moving for summary judgment would bear the burden of proof at trial, 'it must  
 18 come forward with evidence which would entitle it to a directed verdict if the evidence went  
 19 uncontested at trial.'...In such a case, the moving party has the initial burden of establishing  
 20 the absence of a genuine [dispute] of fact on each issue material to its case." *C.A.R. Transp.*  
 21 *Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (internal citations  
 22 omitted). In contrast, when the nonmoving party bears the burden of proving the claim or  
 23 defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate  
 24 an essential element of the nonmoving party's case; or (2) by demonstrating the nonmoving party  
 25 failed to make a showing sufficient to establish an element essential to that party's case on which  
 26 that party will bear the burden of proof at trial. See *Celotex Corp. v. Cartrett*, 477 U.S. 317, 323-  
 27 25 (1986).

28 If the moving party satisfies its initial burden, the burden shifts to the opposing party to  
 29 establish that a genuine dispute exists as to a material fact. See *Matsushita Elec. Indus. Co. v.*  
 30 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a genuine dispute of

1 material fact, the opposing party need not establish a genuine dispute of material fact  
 2 conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a  
 3 jury or judge to resolve the parties' differing versions of the truth at trial." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (quotation marks and citation omitted). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted). The nonmoving party cannot avoid summary judgment by relying solely on conclusory allegations that are unsupported by factual data. *Id.* Instead, the opposition must go beyond the assertions and allegations of the pleadings and set forth specific facts by producing competent evidence that shows a genuine dispute of material fact for trial. *Celotex*, 477 U.S. at 324.

12 That being said,

13 [i]f a party fails to properly support an assertion of fact or fails to properly address  
 14 another party's assertion of fact as required by Rule 56(c), the court may: (1) give  
 15 an opportunity to properly support or address the fact; (2) consider the fact  
 16 undisputed for purposes of the motion; (3) grant summary judgment if the motion  
 17 and supporting materials—including the facts considered undisputed—show that  
 18 the movant is entitled to it; or (4) issue any other appropriate order.

19 Fed. R. Civ. P. 56(e).

20 At summary judgment, the court's function is not to weigh the evidence and determine  
 21 the truth but to determine whether there is a genuine dispute of material fact for trial. *See*  
 22 *Anderson*, 477 U.S. at 249. While the evidence of the nonmovant is "to be believed, and all  
 23 justifiable inferences are to be drawn in its favor," if the evidence of the nonmoving party is  
 24 merely colorable or is not significantly probative, summary judgment may be granted. *Id.* at 249-  
 25 50 (citations omitted).

### 26 III. DISCUSSION

#### 27 **A. ADA & RA Claims**

28 Plaintiff moves for summary judgment as to his ADA and RA claims in Count I. (Doc. # 39.) Defendants' oppose this motion (Doc. # 73) and have filed a cross-motion to dismiss these claims (Doc. # 74).

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1                   **1. Plaintiff's Reference to the Fourteenth Amendment**

2                   Preliminarily, to the extent Plaintiff references claims under the Fourteenth Amendment  
 3 in connection with his claims in Count I (*see, e.g.*, Doc. # 39 at 38), the screening order limited  
 4 Count I only to claims under the ADA and RA. (Doc. # 19 at 4.)

5                   **2. OP 516 Is Not Invalid Because it is Not Dated**

6                   Plaintiff's assertion that OP 516 is invalid because it is not dated (Doc. # 39 at 37-38) is  
 7 without merit. The version of OP 516 Plaintiff provided has an effective date of March 4, 2013,  
 8 clearly stated at the top of the document. (Doc. # 39-2 at 16.) The signatures of authority from  
 9 NDOC appear at the bottom of the document. (Doc. # 39-2 at 19.) There is no authority to  
 10 support Plaintiff's contention that an OP is invalid because the signatures do not have a date next  
 11 to them, or because the effective date is not on the same line as the signatures.

12                   **3. Defendants' Cross-Motion to Dismiss Must be Treated as a Motion for Summary  
 13 Judgment**

14                   Defendants' cross-motion to dismiss relies on evidence beyond the complaint. Generally,  
 15 the court may not consider any material beyond the pleadings in ruling on a motion for dismiss  
 16 without converting it to a motion for summary judgment. *See Swartz v. KPMG LLP*, 476 F.3d  
 17 756, 763 (9th Cir. 2007) (the court will "consider only allegations contained in the pleadings,  
 18 exhibits attached to the complaint, and matters properly subject to judicial notice"). While  
 19 Defendants reference that the court may consider facts of which it may take judicial notice in  
 20 ruling on a motion to dismiss, their motion does not request the court take judicial notice of any  
 21 facts; nor, does the motion present any facts of which the court could sua sponte take judicial  
 22 notice. For this reason, the motion must be treated as one for summary judgment. Plaintiff was  
 23 given sufficient notice that the court may treat the motion as such in the *Klingele* order issued  
 24 following the filing of Defendants' motion. (*See* Doc. # 77.)

25                   **4. Defendant's Standing Argument**

26                   The court will now address Defendants' argument that Plaintiff lacks "standing" because  
 27 he is not a qualified individual with a disability under the ADA and does not want to work.  
 28 (Docs. # 74/75 at 11-16.)

1           “Article III of the Constitution limits the jurisdiction of federal courts to ‘Cases’ and  
 2        “Controversies.”” *Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334, 2341 (2014). Standing is a  
 3        core component of the Article III case or controversy requirement and focuses on whether the  
 4        action was initiated by the proper plaintiff. *See, e.g., Davis v. Fed. Election Comm’n*, 554 U.S.  
 5        724, 732-33 (2008). “To establish Article III standing, a plaintiff must show (a) an ‘injury in  
 6        fact’, (2) a sufficient ‘causal connection between the injury and the conduct complained of,’ and  
 7        (3) a ‘likelihood’ that the injury ‘will be redressed by a favorable decision.’” *Driehaus*, 134 S.Ct.  
 8        at 2341 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Only when these  
 9        elements are absent does the court lack jurisdiction.

10       When the suit is one challenging the legality of government action or inaction, the  
 11       nature and extent of facts that must be averred (at the summary judgment stage) or  
 12       proved (at the trial stage) in order to establish standing depends considerably upon  
 13       whether the plaintiff is himself an objection or the action (or forgone action) at  
 14       issue. If he is, there is ordinarily little question that the action or inaction has  
 15       caused him injury, and that a judgment preventing or requiring the action will  
 16       redress it.

17       *Id.* at 561-62.

18       The purpose of the injury requirement is to verify that the plaintiff has suffered an  
 19       invasion of his “legally protected interests”—that is, an injury sufficiently definite and particular  
 20       such that the law recognizes that a bona fide personal harm has occurred. *Id.* at 561. The injury  
 21       showing eliminates frivolous lawsuits that complain only of generalized grievances common to  
 22       all members of the public. *Id.* at 575. In other words, the injury requirement examines the quality  
 23       and nature of the alleged harm, rather than whether the harm actually occurred. When a harm  
 24       alleged by the plaintiff plainly falls within the broad categories of harms to those interests that  
 25       federal courts recognize as legally protected, assertions that the plaintiff has not suffered the  
 26       injury alleged speak more readily to the substantive elements of particular claims and doctrines,  
 27       rather than to the constitutional powers of the federal courts. Here, Plaintiff’s alleged injuries are  
 28       cognizable under the ADA and RA, and thus satisfy the injury requirement.

## 26       **5. Title I of the ADA**

27       Defendants also argue that to the extent Plaintiff’s complaint can be construed as  
 28       asserting an employment discrimination claim under Title I of the ADA, Plaintiff failed to

1 exhaust his administrative remedies with the EEOC. Neither Plaintiff nor the court in screening  
 2 Plaintiff's complaint have construed Plaintiff's averments as including a claim under Title I of  
 3 the ADA. Instead, as Plaintiff acknowledges, his ADA claim is limited to Title II of the ADA.  
 4 Therefore, the court need not address Defendants' argument that Plaintiff failed to exhaust his  
 5 administrative remedies with the EEOC.

6 **6. Exhaustion**

7 To the extent Plaintiff argues that he has exhausted his administrative remedies relative to  
 8 grievance 2006-29-58159 (Doc. # 39 at 48-50), Defendants do not dispute this is the case.

9 **7. Plaintiff's Claim that He Cannot Be Forced to Work**

10 Throughout his briefing, in support of his ADA and RA claims Plaintiff argues that he  
 11 cannot be forced to work within the prison. While the Thirteenth Amendment prohibits  
 12 involuntary servitude, it contains an explicit exception for those duly convicted of a crime. U.S.  
 13 Const. amend XIII, § 1 ("Neither slavery nor involuntary servitude, *except as a punishment for*  
 14 *crime whereof the party shall have been duly convicted*, shall exist within the United States, or  
 15 any place subject to their jurisdiction." (emphasis added). Plaintiff admits he has been duly  
 16 convicted of a crime; therefore, this argument that he cannot be forced to work in order to  
 17 advance through the level system is without merit. The court will now address the background  
 18 and substance of the ADA and RA claims.

19 **8. Background Facts**

20 On March 4, 2013, Defendants implemented the institutional level system at NNCC  
 21 pursuant to OP 516. (Doc. # 39 at 37; Docs. # 74/75 at 3, Baca Decl., Doc. # 74-2 at 2 ¶ 4.)  
 22 According to Baca, this was "designed to act as both an incentive to foster good behavior and as  
 23 a means to control the movements of [general population] inmates at NNCC." (Baca Decl., Doc.  
 24 # 74-2 at 2 ¶ 4.) Baca asserts that in implementing OP 516, he was complying with the edicts of  
 25 AR 516 which requires such implementation. (*Id.* ¶ 5; .Doc. # 74-3.) One of the performance  
 26 based criteria an institution can take into account in AR 516 is an inmate's work performance.  
 27 (Baca Decl., Doc. # 74-2 at 2 ¶ 6; Doc. # 74-3 at 2.) Other performance based criteria include  
 28 disciplinary activity, program compliance, appearance and environment. (Doc. # 74-3 at 2-3.)

1 The following privileges are allowed to be used as incentives: property, appliances, program  
 2 access, work, yard/tier time, phone access, canteen, recreation/gym access, clothing, packages,  
 3 and work assignments. (*Id.* at 3-4.) Level one allows the maximum number of privileges. (*Id.* at  
 4 4.)

5 According to its terms, OP 516 specifically requires that in order to advance to level one  
 6 status, the inmate, *inter alia*, “must have a job.” (OP 516.02.1, Pl.’s Ex. 18, Doc. # 39-2 at 17.)<sup>3</sup>  
 7 According to OP 516, the only benefits that level one inmates get that level two inmates do not  
 8 are outside workout equipment and access to hobby craft. (Compare OP 516.02.2 to OP  
 9 516.03.2, Pl.’s Ex. 18, Doc. # 39-2 at 17-18.) The more detailed guidelines, however, indicate  
 10 that level two inmates do in fact have access to the hobby craft program. (*See* OP 516.1.15, Pl.’s  
 11 Ex. 18, Doc. # 39-2 at 22; OP 516.2.15, Pl.’s Ex. 18, Doc. # 39-2 at 27.) Therefore, the only  
 12 difference between level one and level two appears to be access to outside workout equipment.<sup>4</sup>

13 Plaintiff claims he is a person with a qualified disability for purposes of the ADA and  
 14 RA, that NDOC regards Plaintiff as a person with a disability, and that his medical classification  
 15 demonstrates he has a disability. (Doc. # 39 at 38-39.) He asserts that his medical classification  
 16 renders him ineligible for any prison work assignment within NDOC; therefore, he is precluded  
 17 from advancing to NNCC’s level one status (because he has to have a work assignment) and  
 18 participating in its programs and receiving its benefits, including outdoor exercise equipment and  
 19 a music program. (*Id.* at 39.)

20 Defendants, on the other hand, argue that Plaintiff does not have a qualified disability  
 21 under the ADA, and even if he did, his failure to advance to level one status was not solely  
 22 because of such disability.

23 ///

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25  
 26 <sup>3</sup> Level two, on the other hand, states that inmates are expected to “secure in unit work assignments, enroll[  
 27 ] in education and/or programming.” (OP 516.03.1, Pl.’s Ex. 18, Doc. # 39-2 at 18.)

28 <sup>4</sup> The court is only assessing the difference between levels one and two because it is clear that when  
 Plaintiff was moved to level three it was due to his failure to work *or* enroll in programming or education, and his  
 failure to program or enroll in education courses cannot be said to have been because of his “disability.”

1                   **9. Analysis**

2                   **a. Law of the ADA & RA**

3                   Title II of the ADA and § 504 of the RA “both prohibit discrimination on the basis of  
 4                   disability.” *Lovell v. Chandler*, 303 F.3d 1039, 1052 (9th Cir. 2002). The ADA applies only to  
 5                   public entities, while the RA applies to all federally funded programs. *Id.*

6                   Title II of the ADA provides:

7                   Subject to the provisions of this subchapter, no qualified individual with a  
 8                   disability shall, by reason of such disability, be excluded from participation in or  
 9                   be denied the benefits of the services, programs or activities of a public entity, or  
 10                   be subjected to discrimination by any such entity.

11                   42 U.S.C. § 12132.

12                   The RA provides in relevant part: “No otherwise qualified individual with a disability...  
 13                   shall, solely by reason of her or his disability, be excluded from the participation in, be denied  
 14                   the benefits of, or be subjected to discrimination under any program or activity receiving Federal  
 15                   financial assistance...” 29 U.S.C. § 794(a).

16                   Both the ADA and RA apply to inmates in prisons. *See Penn. Dept. of Corr. v. Yeskey*,  
 17                   524 U.S. 206, 208-210 (1998) (acknowledging that “[m]odern prisons provide inmates with  
 18                   many recreational ‘activities,’ medical ‘services,’ and educational and vocational ‘programs,’ all  
 19                   of which at least theoretically ‘benefit’ the prisoners (and any of which disabled prisoners could  
 20                   be ‘excluded from participation in?’”); *United States v. Georgia*, 546 U.S. 151, 154 (2006);  
 21                   *Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1063 (9th Cir. 2010) (noting decisions affirming  
 22                   that ADA and RA apply to state prisoners); *O’Guinn v. Lovelock Corr. Ctr.*, 502 F.3d 1056,  
 23                   1060 (9th Cir. 2007) (applying ADA and RA to prisoner’s claims); *Armstrong v. Wilson*, 124  
 24                   F.3d 1019, 1023 (9th Cir. 1997); *Duffy v. Riveland*, 98 F.3d 447 (9th Cir. 1996).

25                   The two acts are nearly identical and case law construing Title II of the ADA generally  
 26                   applies equally to claims under the RA. *See, e.g., Duvall v. County of Kitsap*, 260 F.3d 1124,  
 27                   1135-36 (9th Cir. 2001).

28                   “In ADA cases, the plaintiff bears the burden of establishing the elements of the prima  
 29                   facie case[.]” *Pierce v. County of Orange*, 526 F.3d 1190, 1217 (9th Cir. 2008). A plaintiff  
 30                   pursuing a claim under the ADA and RA must show:

1 (1) he “is an individual with a disability;” (2) he “is otherwise qualified to  
 2 participate in or receive the benefit of some public entity’s services, programs, or  
 3 activities;” (3) he “was either excluded from participation in or denied the benefits  
 4 of the public entity’s services, programs, or activities, or was otherwise  
 discriminated against by the public entity;” and (4) “such exclusion, denial of  
 benefits, or discrimination was by reason of [his] disability.”

5 *McGary v. City of Portland*, 386 F.3d 1259, 1265 (9th Cir. 2004) (quoting *Thompson v. Davis*,  
 6 295 F.3d 890, 895 (9th Cir. 2002) (per curiam)).

7 A claim under the RA similarly requires that a Plaintiff establish: “(1) he is an individual  
 8 with a disability; (2) he is otherwise qualified to receive the benefits; (3) he was denied the  
 9 benefits of the program solely by reason of his disability; and (4) the program receives federal  
 10 financial assistance.” *O’Guinn*, 502 F.3d at 1060 (internal quotation marks and citation omitted).

11 The ADA and RA encompass all services, programs, and activities provided by a prison  
 12 to its prisoners. *See, e.g., Armstrong v. Wilson*, 124 F.3d 1019, 1024 (9th Cir. 1997).

13 A “qualified individual with a disability” is “an individual with a disability who, with or  
 14 without reasonable modifications to rules, policies or practices, the removal of architectural,  
 15 communication or transportation barriers, or the provision of auxiliary aids and services, meets  
 16 the essential eligibility requirements for the receipt of services or the participation in programs or  
 17 activities provided by a public entity.” 42 U.S.C. § 12131(2).

18 An individual has a “disability” within the meaning of Title II of the ADA if he has:  
 19 “(A) a physical or mental impairment that substantially limits one or more major life activities of  
 20 such individual; (B) a record of such impairment; or (C) [is] regarded as having such an  
 21 impairment[.]” 42 U.S.C. § 12102(1).

22 Thus, there are three prongs of the disability definition, or three ways an individual may  
 23 prove he is disabled under the ADA (and RA). Under the first prong of the disability test, the  
 24 individual must have a physical or mental impairment that substantially limits one or more major  
 25 life activities. 42 U.S.C. § 12102(1)(A). Under the ADA’s implementing regulations, “physical  
 26 or mental impairment” means:

27 (A) Any physiological disorder or condition, cosmetic disfigurement, or  
 28 anatomical loss affecting one or more of the following body systems:  
 neurological, musculoskeletal; special sense organs; respiratory, including speech

1                   organs; cardiovascular; reproductive; digestive; genitourinary; hemic and  
 2                   lymphatic; skin; and endocrine;

3                   (B) Any mental or psychological disorder such as mental retardation, organic  
 4                   brain syndrome, emotional or mental illness, and specific learning disabilities.

5                   28 C.F.R. § 35.104.

6                   “[P]hysical or mental impairment includes, but is not limited to, such contagious and  
 7                   noncontagious diseases and conditions as orthopedic, visual, speech and hearing impairments,  
 8                   cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes,  
 9                   mental retardation, emotional illness, specific learning disabilities, HIV disease (whether  
 10                  symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.” 28 C.F.R. §  
 11                  35.104.

12                  “Major life activities” means functions such as “caring for one’s self, performing manual  
 13                  tasks, seeing, hearing, eating, walking, standing, lifting, bending, speaking, breathing, learning,  
 14                  reading, concentrating, thinking, communicating, and working.” 42 U.S.C. § 12102(2)(A);

15                  28 C.F.R. § 35.104. They also include “the operation of a major bodily function, including but  
 16                  not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder,  
 17                  neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”

18                  42 U.S.C. § 12102(2)(B). “It is not possible to include a list of all the specific conditions,  
 19                  contagious and noncontagious diseases, or infections that would constitute physical or mental  
 20                  impairments because of the difficult of ensuring the comprehensiveness of such a list,  
 21                  particularly in light of the fact that other conditions or disorders may be identified in the future.”

22                  28 C.F.R. Pt. 35, App. B § 35.104.

23                  When the major life activity under the first test for disability is working (as Plaintiff  
 24                  alleges is the major life activity impacted here), to be substantially limited, the individual must  
 25                  be unable to work in a broad class of jobs. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999),  
 26                  overturned on other grounds due to legislative action in U.S. Pub. L. 110-325 (Jan. 1, 2009); see  
 27                  also 29 C.F.R. § 1630.2(j)(3)(1).

28                  The second prong of the disability definition—having a record of such an  
 29                  impairment—means that the individual “has a history of, or has been misclassified as having, a

1 mental or physical impairment that substantially limits one or more major life activities.” 28  
 2 C.F.R. § 35.104. “This provision [was] included in the definition in part to protect individuals  
 3 who have recovered from a physical or mental impairment that previously substantially limited  
 4 them in a major life activity.” 28 C.F.R. Pt. 35, App. B § 35.104.

5 The third prong of the disability definition—being regarded as having an  
 6 impairment—requires that the individual establish “that he or she has been subjected to an action  
 7 prohibited under [Title II of the ADA] because of an actual or perceived physical or mental  
 8 impairment whether or not the impairment limits or is perceived to limit a major life activity.” 42  
 9 U.S.C. § 12102(3)(A). It means that the individual:

- 10 (i) Has a physical or mental impairment that does not substantially limit major life  
 activities but that is treated by a public entity as constituting such a limitation;
- 11 (ii) Has a physical or mental impairment that substantially limits major life  
 activities only as a result of the attitudes of others toward such impairment; or
- 12 (iii) Has none of the impairments defined in paragraph (1) of this definition but is  
 treated by a public entity as having such an impairment.

13 28 C.F.R. § 35.104. “This test ... is intended to cover persons who are treated by a public entity  
 14 as having a physical or mental impairment that substantially limits a major life activity. It applies  
 15 when a person is treated as if he or she has an impairment that substantially limits a major life  
 16 activity, regardless of whether that person has an impairment.” 28 C.F.R. Pt. 35, App. B §  
 17 35.104. “A person who perceives himself or herself to have an impairment, but does not have an  
 18 impairment, and is not treated as if he or she has an impairment, is not protected under this test.”  
 19 28 C.F.R. Pt. 35, App. B § 35.104. Under this prong, it is the defendant’s perception that is key.  
 20

21 *Id.*

22 **b. Discussion**

23 For the reasons discussed below, the court finds that a genuine dispute of material fact  
 24 exists as to whether Plaintiff is disabled under the ADA and RA<sup>5</sup>; therefore, both Plaintiff’s  
 25 motion for summary judgment as to his ADA and RA claims and Defendants’ cross-motion to  
 26 dismiss Plaintiff’s ADA and RA claims should be denied.

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27  
 28 <sup>5</sup> Defendants concede that a genuine dispute of material fact exists as to whether Plaintiff is disabled under  
 the ADA and RA. (See Docs. # 73/74 at 7:11-12, 8:17.)

1       In his briefing, Plaintiff states that he is an individual with a disability pursuant to Title II  
2 of the ADA. (*See* Doc. # 39 at 20 ¶¶ 8-12, 37, 39, and referencing his Exhibits 12, 19, 20; Pl.’s  
3 Aff., Ex. 20, Doc. # 39-2 at 39 ¶ 2, 41 ¶ 5.) He claims that his medical records and medical  
4 classification have rendered him ineligible for a prison work assignment and that he has inquired  
5 into work assignments that would make him eligible for level one status on various occasions  
6 and each time was told he was ineligible for work because of his medical restrictions. (*Id.*) The  
7 ability to work is a major life activity and he is otherwise eligible for level one status. As such,  
8 he contends that he has been denied the benefits of level one status as a result of disability.

9       While Plaintiff focuses mainly on the third prong of the disability definition—that he has  
10 been regarded as disabled by NDOC by virtue of his medical classification and resulting inability  
11 to obtain a work assignment—he, in essence, argues that he qualifies as disabled under all three  
12 prongs of the ADA definition.

13       The first prong defines disability as a physical or mental impairment that substantially  
14 limits a major life activity. Plaintiff does not identify a specific physical impairment, but  
15 contends that his medical status, as set forth in his medical records and classification, have  
16 substantially limited a major life activity as he has been precluded from obtaining any job  
17 assignment at NNCC, which is a prerequisite for advancement to level one status.

18       The second prong considers an individual disabled when that individual has a record of  
19 an impairment that substantially limits a major life activity, and Plaintiff contends that his  
20 medical records contain his medical classification and restrictions which have precluded him  
21 from working.

22       Finally, under the third prong of the disability definition, which covers an individual  
23 regarded as having an impairment that substantially limits a major life activity, Plaintiff similarly  
24 argues that due to his medical classification (which precludes him from working), NDOC has  
25 regarded him as having such an impairment.

26       In support of his position, Plaintiff states in his affidavit that he inquired many times  
27 about obtaining a work assignment, but was told he could not obtain a work assignment due to  
28 his medical status. (Pl.’s Aff., Doc. # 39 at 41.) Plaintiff also relies on a response to a request he

1 sent his caseworker in February 2014, where he asked to be submitted for a job assignment  
 2 which would make him eligible for level one status. (Pl.'s Ex. 19, Doc. # 39-2 at 36.) On March  
 3 4, 2014, he was advised by the caseworker: "Due to your med restrictions I cannot give you a job  
 4 at this time." (*Id.*)<sup>6</sup>

5 Defendants argue that Plaintiff has not sufficiently identified a physical impairment for  
 6 purposes of establishing he is disabled under the ADA and RA. Defendants further contend that  
 7 Plaintiff suffers from only three documented medical conditions, Type 2 diabetes, hypertension  
 8 and a congenital heart condition secondary to the placement of a surgically placed stent in his  
 9 artery. (Docs. # 73/74 at 3.) They argue that his symptoms from these conditions do not  
 10 substantially limit any major life activity. (*Id.* at 4, 12-13.)

11 Defendants' argument regarding Plaintiff's symptoms from three documented medical  
 12 conditions misses the point. Plaintiff's theory is not that any particular symptom from his  
 13 diabetes, hypertension or congenital heart condition substantially limits him, but that his  
 14 combined medical conditions have resulted in a medical classification which has precluded him  
 15 from obtaining a work assignment within NNCC. The ability to work is indisputably a major life  
 16 activity.

17 The court finds that Plaintiff's statements in his affidavit that his medical records and  
 18 classification preclude him from working within NNCC and that he in fact requested work  
 19 assignments to advance to level one status but was told he could not obtain a work assignment  
 20 due to his medical restrictions, coupled with the caseworker's response in March of 2014 that  
 21 corroborates Plaintiff's statements, are sufficient to meet his burden of presenting evidence that  
 22 he is disabled under the ADA and RA.<sup>7</sup> Plaintiff appears to be asserting that a combination of

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23  
 24 <sup>6</sup> Plaintiff references an Exhibit 12 in support of his claim, only the cover page of the exhibit was submitted  
 25 and not the actual exhibit. (See Doc. # 39-1 at 47, Doc. # 39-2 at 1.) He identifies this as his medical classification.  
 Nevertheless, Defendants seem to acknowledge his restricted status as defendant Baca states that in order for him to  
 assist Plaintiff in obtaining a job to qualify for level one status, he would have to get physician approval.

26 <sup>7</sup> While Plaintiff should could have more specifically identified the physical impairments that have  
 27 substantially impaired a major life activity, as is explained in detail *infra*, he presents sufficient evidence under both  
 28 the second and third prongs of the ADA definition of disability to proceed with his claim. Moreover, he appears to  
 be claiming that not just one impairment resulted in his disability, but a combination of all of his documented  
 physical impairments led to the medical restrictions which precluded him from working. The court finds this  
 sufficient to proceed even under prong one of the disability definition.

1 physical impairments identified in his medical records, and not just one particular documented  
 2 impairment, has substantially limited a major life activity—his ability to work.

3 In addition to meeting his burden relative to his own motion for partial summary  
 4 judgment, this evidence serves to raise a genuine dispute of material fact as to whether he is  
 5 disabled so as to defeat Defendants' cross-motion on this issue. Plaintiff is not required to  
 6 produce specific medical evidence in support of his claim, as Defendants suggest. "Ninth Circuit  
 7 precedent does not require comparative or medical evidence to establish a genuine issue of  
 8 material fact regarding the impairment of a major life activity at the summary judgment stage.  
 9 Rather, our precedent supports the principle that a plaintiff's testimony may suffice to establish a  
 10 genuine issue of material fact." *Head v. Glacier Northwest Inc.*, 413 F.3d 1053, 1058 (9th Cir.  
 11 2005) (citing *McAlindin v. County of San Diego*, 192 F.3d 1226 (9th Cir. 1999)).

12 Just as Plaintiff's evidence raises a genuine dispute of material fact as to whether or not  
 13 he is disabled under the ADA and RA, Defendants have likewise presented evidence to raise a  
 14 genuine dispute of material fact on this issue in response to Plaintiff's motion, under any of the  
 15 three prongs of the disability definition. Defendants point to the grievance responses Plaintiff  
 16 received when he grieved his inability to advance to level one status.

17 First, in response to his informal level grievance on this issue, Plaintiff was advised:  
 18 According to OP 516.2 you are a Medium Custody Inmate that meets the  
 19 requirements for Level II. Pending available bed space you are eligible to be  
 20 transferred to a Unit with Level II privileges. With your current Medical  
 Classification you are encouraged to obtain a job that does not exceed your  
 restrictions and continue to advance through the Level System. Grievance Denied.

21 (Pl.'s Ex. 5, Doc. # 39-1 at 28.)

22 In his "response" (his first level grievance), Plaintiff asserted that due to his medical  
 23 restrictions, he falls under a "medically unassigned" status which precludes him from holding  
 24 any work assignment, indicating that doctors ordered that he not work. (Pl.'s Ex. 16, Doc. # 39-2  
 25 at 11.) Therefore, he stated that he could never be eligible for level one status. (*Id.*) In response,  
 26 Plaintiff was told, *inter alia*, "you have had every opportunity to work and program in order to  
 27 advance through the level system. A review of your current work assignment shows unassigned  
 28

1 as you have not applied to work or enrolled in any programs therefore not making you eligible  
2 for level 1.” (Pl.’s Ex. 17, Doc. # 39-2 at 14.)

3 Prison officials responded to Plaintiff’s second level grievance on this issue on March 10,  
4 2014, stating, *inter alia*:

5 Per NRS 209.352 the Director may establish, with the approval of the Board, a  
6 system for offender management, to be implemented in each institution and  
7 facility of the Department, which consists of structured living programs for  
8 offenders and the management of units by the staff, with levels of custody,  
9 security and privileges and opportunities for offenders based upon the assessed  
10 needs of the offenders as determined by their initial and ongoing classification  
11 and evaluation. AR 516 authorizes 3 levels for a medium custody institution and  
12 indicates each level should have performance based criteria, including but not  
13 limited to work, disciplinary, program compliance, appearance, and environment.  
14 When you claim the level system was implemented at NNCC on 3-4-13, you were  
15 in Unit 2, which was designated as a Level II unit. You are in a Level II unit as of  
16 this date as well. Previous response indicates that you have failed to work or  
17 program as required to meet criteria for Level I. You have several medical  
18 restrictions, including a restriction which indicates that work/program  
19 assignments are limited due to functional limitation, not that you are “medical  
20 unassigned” because you can<sup>8</sup> perform any work or attend any programs. You  
21 could, should you choose, work with medical and classification staff to try to get  
22 into a work or program assignment consistent with this medical restriction. Many  
23 such NDOC inmates have this restriction and are able to work and/or program and  
24 be housed in Level 1.

25 (Pl.’s Ex. 37, Doc. # 39-3 at 96.)

26 Insofar as Plaintiff asserts a disability under the first prong of the disability definition,  
27 this evidence creates a genuine dispute of material fact as to whether Plaintiff suffered from a  
28 physical impairment(s) which substantially limited a major life activity. Specifically, this  
evidence raises a question as to whether there were jobs that Plaintiff could perform consistent  
with his functional limitations that would allow him to qualify for level one status. Plaintiff, on  
the other hand, maintains that whenever he inquired about such assignments he was told he was  
precluded due to his medical restrictions and provides his caseworker’s response in March 2014  
in corroboration of this statement.

Under the second prong of the disability definition, this evidence raises a genuine dispute  
of material fact as to whether Plaintiff had a record of an impairment that substantially limits a

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<sup>8</sup> The court assumes the author meant to say “cannot” here.

1 major life activity. The grievance response at the second level suggests that while Plaintiff may  
 2 have functional limitations, he was not precluded from performing *any* work assignment. Again,  
 3 Plaintiff presents evidence to the contrary.

4 Under the third prong of the disability definition, this evidence raises a genuine dispute of  
 5 material fact as to whether Plaintiff was regarded as having such an impairment. Plaintiff argues  
 6 that it does not matter whether Plaintiff had the ability to work or not because NDOC regarded  
 7 him as having a disabling impairment; however, under this prong, Defendants' perceptions are  
 8 key, and this evidence raises a genuine dispute of material fact as to the status of those  
 9 perceptions. The evidence indicates that perhaps Defendants did not in fact consider Plaintiff  
 10 unable to work. Plaintiff, on the other hand, presents evidence that they did. This will need to be  
 11 resolved by the fact finder.

12 Defendants argue that they should be granted summary judgment on the additional basis  
 13 that Plaintiff cannot establish that he was denied the benefits of level one status due solely to his  
 14 disability, because his failure to advance to level one was a result of other factors, including his  
 15 failure to participate in programming or education courses. (Docs. # 73/74 at 5, 15; Baca Suppl.  
 16 Dec., Doc. # 89-6.) Defendants are correct that Plaintiff must otherwise be eligible for level one  
 17 status; however, participation in programming or education courses is not a requirement for level  
 18 one status. The only requirements for advancement to level one status are: the inmate must have  
 19 spent a minimum of thirty days in level two; the inmate must be 180 days disciplinary free; the  
 20 inmate *must have a job*; and the inmate must be in compliance with all housing rules and  
 21 operations procedures in order to remain in level one housing. (OP 516.02.1, Pl.'s Ex. 18, Doc.  
 22 # 39-2 at 17.)

23 Defendants also argue that Plaintiff cannot show that he is otherwise eligible for level one  
 24 status because he testified in his deposition that even if a job was available he may not take it  
 25 because he does not think jobs exist that he is interested in. (Docs. # 73/74 at 15; Pl.'s Depo. at  
 26 Doc. # 73-4.) Therefore, they contend that the reason Plaintiff does not advance to level one  
 27 status is not because he is disabled and precluded from working, but because he is "picky with  
 28 jobs." (Docs. # 73/74 at 15.) This argument is unavailing. There is no evidence before the court

1 that Plaintiff has in fact been offered any work assignment, let alone evidence that he rejected  
 2 such an assignment. If that were the case, the court could surely find that Plaintiff's exclusion  
 3 from the benefits of level one status was not due solely to his disability, but instead due to his  
 4 own choices; however, those are not the facts before the court.

5 Defendants also assert that Baca agreed to offer Plaintiff a level one qualifying job after  
 6 Plaintiff met with Dr. Gedney to ascertain his level of disability and his physical limitations, and  
 7 would prescribe any reasonable accommodations, but Plaintiff refused to accept the appointment.  
 8 (Docs. # 73/74 at 5 n. 5; Baca Decl., Doc. # 74-2.) Plaintiff disputes this. (Pl.'s Supp. Aff., Doc.  
 9 # 83 at 30 ¶ 5.) Plaintiff contends he did not have any communications with Baca since March 4,  
 10 2013. (*Id.*) In their reply, Defendants clarify that the actual communication came from counsel  
 11 for Baca as he was a defendant in this litigation at that time. (Doc. # 89 at 2-3.)

12 Plaintiff further contends that there is no need for an additional assessment with  
 13 Dr. Gedney because during a March 15, 2013 appointment with Dr. Gedney, Plaintiff was  
 14 advised that she would not permit Plaintiff to hold a work assignment. (Pl.'s Supp. Aff., Doc.  
 15 # 83 at 30 ¶¶ 4-5.) He mentions that he did not refuse a doctor's appointment as none was ever  
 16 made. (*Id.* at 30-31 ¶ 5.) He acknowledges that he did sign a medical refusal form, but contends  
 17 he signed it under duress and he did not state on the form what he was refusing, which he claims  
 18 was only the blood draw in October 2014. (*Id.*)

19 There are factual disputes regarding Baca's asserted overture; therefore, this cannot serve  
 20 as a basis for granting summary judgment in Defendants' favor.

21 Finally, Defendants briefly mention that in order to recover monetary damages under  
 22 Title II of the ADA, a plaintiff must prove intentional discrimination on the part of the defendant.  
 23 (Docs. # 73/74 at 15:6-14.) Defendants then move on to another argument, without stating how  
 24 Plaintiff has failed to prove intentional discrimination. Plaintiff addresses the argument in his  
 25 opposition (Doc. # 85); therefore, the court will address it.

26 Plaintiff's complaint contains a request for relief that only seeks monetary damages.  
 27 (Doc. # 20 at 32.) Defendants are correct that in order to "recover monetary damages under  
 28 Title II of the ADA or the [RA], a plaintiff must prove intentional discrimination on the part of

1 the defendant.” *Duvall v. County of Kitsap*, 260 F.3d 1124, 1138 (9th Cir. 2001) (citing  
 2 *Ferguson v. City of Phoenix*, 157 F.3d 668, 674 (9th Cir. 1998)). To prove intentional  
 3 discrimination, a plaintiff must prove deliberate indifference. *See id.* at 1138-39. “Deliberate  
 4 indifference requires both knowledge that a harm to a federally protected right is substantially  
 5 likely, and a failure to act upon that likelihood.” *Id.* at 1139 (citing *City of Canton v. Harris*, 489  
 6 U.S. 378, 389 (1988); *id.* at 395 (O’Connor, J., concurring) (deliberate indifference requires both  
 7 “some form of notice … and the opportunity to conform to [statutory] dictates”)). “When the  
 8 plaintiff has alerted the public entity to his need for accommodation (or where the need for  
 9 accommodation is obvious, or required by statute or regulation), the public entity is on notice  
 10 that an accommodation is required, and the plaintiff has satisfied the first element of the  
 11 deliberate indifference test.” *Duvall*, 260 F.3d at 1130.

12 In response, Plaintiff asserts that he was advised by defense counsel that Defendants were  
 13 aware of deficiencies with OP 516 and the need to make it “ADA friendly,” yet no changes have  
 14 been made. (Doc. # 85 at 13.) Moreover, Plaintiff made Defendants aware of the deficiencies  
 15 through his grievances which alerted Defendants that he was being excluded from the benefits of  
 16 level one status based on his disability, and Defendants did not remedy the situation. While  
 17 Defendants argue that Baca has since offered to work with Plaintiff to determine if there is a job  
 18 he can perform despite any functional impairments, this does not change the fact that nothing  
 19 was done between the time that Plaintiff grieved the issue until the asserted offer to assist him  
 20 was made, for which he may be entitled to damages. This is at least sufficient to create a genuine  
 21 dispute of material fact as to whether Defendants were deliberately indifferent so that Plaintiff  
 22 may proceed with his claim for damages under the ADA and RA.

23 For these reasons, Plaintiff’s motion for partial summary judgment on his ADA and RA  
 24 claims and Defendants’ cross-motion to dismiss Plaintiff’s ADA and RA claims should be  
 25 denied.

26 **B. Count III-Access to Courts**

27 On screening, the court concluded that Count III stated a colorable claim for denial of the  
 28 right of access to the courts. (Doc. # 19 at 6-7.) This claim is based on the allegation that

1 Defendants intentionally delayed the grievance process which frustrated Plaintiff's ability to  
 2 exhaust his administrative remedies and file this lawsuit. (*Id.* at 7.) The court did not permit  
 3 Plaintiff to proceed with a due process claim. Accordingly, the court will only address this claim  
 4 insofar as it relates to Plaintiff's alleged denial of access to the courts.

5 The parties agree that grievance 2006-29-58159 is the only grievance applicable to Count  
 6 III. Plaintiff's motion is centered on his argument that he exhausted his administrative remedies  
 7 relative to Count III. Plaintiff's motion does not focus on the elements necessary to establish a  
 8 claim that his right to access the courts was denied. (Doc. # 39.) Defendants initially argued that  
 9 Plaintiff failed to exhaust his administrative remedies as to this claim, but subsequently retracted  
 10 that argument, and argue only that Plaintiff cannot establish the actual injury element of his  
 11 access to courts claim. (Doc. # 127 at 8 n. 4.)<sup>9</sup>

12 Preliminarily, the court will address Plaintiff's arguments that Defendants' motion fails to  
 13 contain a statement of material facts not genuinely in issue, and that Defendants were not  
 14 permitted to file a successive motion for summary judgment. (Doc. # 126 at 12-18, 20-24.)  
 15 While Defendants do not title their statement of undisputed facts as such, it is contained within  
 16 their motion. (*See* Doc. # 117 at 2-4.) In addition, the court has already addressed and rejected  
 17 Plaintiff's argument that Defendants are precluded from bringing a successive motion for  
 18 summary judgment and will not address the argument again in this instance. (Doc. # 122.)

19 Inmates have a constitutional right of access to the courts. *See Lewis v. Casey*, 518 U.S.  
 20 343, 346 (1996). To establish a violation of the right of access to the courts, an inmate must  
 21 establish that he or she suffered an actual injury, a jurisdictional requirement that flows from the  
 22 standing doctrine and may not be waived. *Id.* at 348 (citation omitted); *see also Alvarez v. Hill*,  
 23 518 F.3d 1152, 1155 n. 1 (9th Cir. 2008) (explaining, “[f]ailure to show that a ‘non-frivolous  
 24 legal claim ha[s] been frustrated’ is fatal” to a claim of denial of access to the courts). “Actual  
 25 injury” is defined as “actual prejudice with respect to contemplated or existing litigation, such as  
 26 inability to meet a filing deadline or present a claim.” *Id.* at 348 (internal quotation marks and

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27  
 28 <sup>9</sup> Plaintiff requested sanctions as a result of Defendants' inclusion of an argument that he did not exhaust  
 his administrative remedies relative to this claim. In light of counsel's explanation that the exhaustion argument was  
 a result of inadvertence, the court did not entertain Plaintiff's request.

1 citation omitted). The right of access to the courts is limited to non-frivolous direct criminal  
 2 appeals, habeas corpus proceedings and section 1983 actions. *See Lewis*, 518 U.S. at 343 n. 3,  
 3 354-55; *Simmons v. Sacramento Cnty. Super. Ct.*, 318 F.3d 1156, 1159-60 (9th Cir. 2003). The  
 4 right of meaningful access to the courts also extends to established grievance procedures.  
 5 *Bradley v. Hall*, 64 F.3d 1276, 1279 (9th Cir. 1995) (citing *Valandingham v. Bojorquez*, 866  
 6 F.2d 1135, 1138 (9th Cir. 1989); *Hines v. Gomez*, 853 F.Supp. 329, 331-32 (N.D. Cal. 1994)),  
 7 *overruled on other grounds by Shaw v. Murphy*, 532 U.S. 223, 230 n. 2 (2001). Under the PLRA,  
 8 an inmate is required to exhaust established administrative remedies (through the grievance  
 9 process within NDOC) before securing relief in federal court. As such, “a prisoner’s fundamental  
 10 right of access to the courts hinges on his ability to access the grievance system.” *Id.*

11 While Plaintiff alleges there was a delay in completing the grievance process as a result  
 12 of prison officials failure to heed their own response deadlines, it is undisputed that he was  
 13 ultimately able to exhaust his administrative remedies and file this lawsuit to proceed with his  
 14 claim that his rights under the ADA and RA were being violated in connection with the prison’s  
 15 level system, and that he was being precluded from accessing the courts. In addition, while he  
 16 alleges that prison officials failed to follow their own regulations in terms of timely responding  
 17 to his grievances, it is undisputed that AR 740 allows an inmate to proceed to the next grievance  
 18 level when a prison response is overdue. Therefore, it cannot be said that Plaintiff suffered actual  
 19 injury in connection with Count III.

20 Therefore, Defendants should be granted summary judgment as to Count III.

### 21 **C. Count IV-Access to Courts**

22 In Count IV, Plaintiff alleges that on August 20, 2013, prior to submitting his informal  
 23 level grievance (number 2006-29-67049), he attempted to informally resolve his claims with his  
 24 caseworker, defendant Humphrey, to attach to his informal level grievance. (*Id.* at 24.) He claims  
 25 that he gave Humphrey an inmate request form where he asked Humphrey to acknowledge his  
 26 attempts to informally resolve his claims, but Humphrey refused to provide this  
 27 acknowledgement. (*Id.* at 24-25.) He avers that Humphrey admitted Plaintiff could not have his  
 28 grievance accepted without proof of trying to informally resolve the issues, and that Plaintiff had

1 to exhaust his administrative remedies prior to filing suit. (*Id.* at 25.) The parties also agree that  
 2 grievance 2006-29-67049 is the only grievance applicable to Count IV.

3 Plaintiff argues that Lisa Walsh improperly responded to his informal level grievance  
 4 when she was the subject of the grievance, contrary to AR 740.05(1)(D), which made the  
 5 grievance process functionally unavailable to him. (*Id.* at 36, 50-51; Doc. # 39-3 at 2-11.) He  
 6 contends that she should not have taken any action with respect to that grievance. (Doc. # 39 at  
 7 52.) Defendants argue that Plaintiff failed to exhaust his administrative remedies with respect to  
 8 Count IV, and that Plaintiff did not suffer actual injury.

9 The court must first address whether Plaintiff exhausted his administrative remedies with  
 10 respect to Count IV, for which the pertinent grievance is 2006-29-67049, or whether  
 11 administrative remedies were effectively unavailable to Plaintiff. Plaintiff does not dispute that  
 12 he did not pursue this grievance past the informal level. Instead, he argues that Lisa Walsh  
 13 improperly responded to the grievance when she was a subject of the grievance by rejecting it as  
 14 improper for containing multiple issues. (Doc. # 126 at 26-27.) In his response, he further  
 15 contends that the rejection itself was improper because AR 740 does not sanction the rejection of  
 16 a grievance as improper for containing multiple issues. (*Id.* at 28-29.)

17 The Prison Litigation Reform Act (PLRA) provides that “[n]o action shall be brought  
 18 with respect to prison conditions under section 1983 of this title, or any other Federal law, by a  
 19 prisoner confined in any jail, prison, or other correctional facility until such administrative  
 20 remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). An inmate must exhaust his  
 21 administrative remedies irrespective of the forms of relief sought and offered through  
 22 administrative avenues. *Booth v. Churner*, 532 U.S. 731, 741 (2001).

23 The failure to exhaust administrative remedies is “an affirmative defense the defendant  
 24 must plead and prove.” *Albino v. Baca*, 747 F.3d 1162, 1166 (9th Cir. 2014), *cert. denied*, 135  
 25 S.Ct. 403 (Oct. 20, 2014) (quoting *Jones v. Bock*, 549 U.S. 199, 204, 216 (2007)). Unless the  
 26 failure to exhaust is clear from the face of the complaint, the defense must be raised in a motion  
 27 for summary judgment. *See id.* (*overruling in part Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th  
 28

1 Cir. 2003) which stated that failure to exhaust should be raised in an "unenumerated Rule 12(b)  
 2 motion").

3 As such: "If undisputed evidence viewed in the light most favorable to the prisoner shows  
 4 a failure to exhaust, a defendant is entitled to summary judgment under Rule 56. If material facts  
 5 are disputed, summary judgment should be denied, and the district judge rather than a jury  
 6 should determine the facts [in a preliminary proceeding]." *Id.*, 1168, 1170-71 (citations omitted).  
 7 "Exhaustion should be decided, if feasible, before reaching the merits of a prisoner's claim. If  
 8 discovery is appropriate, the district court may in its discretion limit discovery to evidence  
 9 concerning exhaustion, leaving until later—if it becomes necessary—discovery related to the  
 10 merits of the suit." *Id.* at 1170 (citing *Pavey v. Conley*, 544 F.3d 739, 742 (7th Cir. 2008)). If  
 11 there are disputed factual questions, they "should be decided at the very beginning of the  
 12 litigation." *Id.* at 1171.

13 "The PLRA mandates that inmates exhaust all available administrative remedies before  
 14 filing 'any suit challenging prison conditions,' including, but not limited to, suits under § 1983."  
 15 *Id.* (citing *Woodford v. Ngo*, 548 U.S. 81, 85 (2006)). To be clear, "[a]n inmate is required to  
 16 exhaust only *available* remedies." *Id.* (emphasis original) (citing *Booth v. Churner*, 532 U.S.  
 17 731, 736 (2001)). "To be available, a remedy must be available 'as a practical matter'; it must be  
 18 'capable of use; at hand.'" *Id.* (quoting *Brown v. Valoff*, 422 F.3d 926, 937 (9th Cir. 2005)); *see also*  
 19 *Williams v. Paramo*, 775 F.3d 1182, 1191 (9th Cir. 2015) (citation omitted).

20 Once a defendant shows that the plaintiff did not exhaust available administrative  
 21 remedies, the burden shifts to the plaintiff "to come forward with evidence showing that there is  
 22 something in his particular case that made the existing and generally available administrative  
 23 remedies effectively unavailable to him." *Id.* at 1172 (citing *Hilao v. Estate of Marcos*, 103 F.3d  
 24 767, 778 n. 5 (9th Cir. 1996)). The ultimate burden of proof, however, remains with the  
 25 defendant. *Id.*

26 The Supreme Court has clarified that exhaustion cannot be satisfied by filing an untimely  
 27 or otherwise procedurally infirm grievance, but rather, the PLRA requires "proper exhaustion."  
 28 *Woodford v. Ngo*, 548 U.S. 81, 89 (2006). "Proper exhaustion" refers to "using all steps the

1 agency holds out, and doing so *properly* (so that the agency addresses the issues on the merits).”  
 2 *Id.* (quoting *Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002)) (emphasis in original).

3 If the court concludes that administrative remedies have not been properly exhausted, the  
 4 unexhausted claim(s) should be dismissed without prejudice. *Wyatt v. Terhune*, 315 F.3d 1108,  
 5 1120 (9th Cir. 2003), *overruled on other grounds by Albino v. Baca*, 747 F.3d 1162 (9th Cir.

6 NDOC’s Administrative Regulation (AR) 740 governs the inmate grievance process. (See  
 7 Pl.’s Ex. 1, Doc. # 39-1 at 2-12.) “Inmates may use the Inmate Grievance Procedure to resolve  
 8 addressable inmate claims including, but not limited to, personal property, property damage,  
 9 disciplinary appeals, personal injuries, and any other tort claim or civil rights claim relating to  
 10 conditions of institutional life.” (AR 740.03.1, Doc. # 39-1 at 3.) The grievance process at  
 11 NDOC consists, in essence, of four steps. First, an inmate is “expected to resolve grievable  
 12 issues through discussion with their caseworker prior to initiating the grievance process [except  
 13 for allegations of inmate abuse, which are to be immediately reported], or where resolution is not  
 14 possible such as disciplinary appeals.” (AR 740.04.1, Doc. # 39-1 at 5.) “An informal resolution  
 15 may be accomplished in writing *or* in direct consultation with the appropriate staff.” (AR  
 16 740.04.2, Doc. # 39-1 at 5 (emphasis added).) Next, after attempting to resolve the dispute  
 17 informally or where informal resolution is not possible, an inmate must file an informal level  
 18 grievance. (AR 740.05, Doc. # 39-1 at 5-7.)

19 “An inmate who is dissatisfied with the response to a grievance at any level may appeal  
 20 the grievance to the next level, within the substantive and procedural requirements outlined  
 21 herein.” (AR 740.03.6, Doc. # 39-1 at 4.) Prison officials are to “automatically allow appeals  
 22 without interference.” (AR 740.03.6.A, Doc. # 39-1 at 4.) If a prison response is overdue, an  
 23 inmate may proceed to the next grievance level (except at the second level as there is no further  
 24 level for review). (AR 740.03.8.B, Doc. # 39-1 at 4.) In addition, if an inmate does not move  
 25 forward with his appeal when a response is overdue and instead, elects to wait for a response,  
 26 “[t]he overdue response does not count against the inmate’s timeframe for an appeal.” (AR  
 27 740.03.8.C, Doc. # 39-1 at 4.)

28

1        If an inmate is unhappy with the response to an informal level grievance, he may proceed  
 2 with filing a first level grievance. (AR 740.06, Doc. # 39-1 at 7-8.) Finally, if an inmate is not  
 3 happy with the response to a first level grievance, he may file a second level grievance. (AR  
 4 740.07, Doc. # 39-1 at 8.)

5        AR 740 also provides a discussion of conduct deemed to be an abuse of the grievance  
 6 procedure. (AR 740.09, Doc. # 39-1 at 9-10.) It is considered to be an abuse of the grievance  
 7 procedure if a grievance “contains two or more appropriate issues.” (AR 740.09.2.F, Doc. # 39-1  
 8 at 10.) When an inmate files a grievance that is considered to be an abuse of the grievance  
 9 procedure, the grievance is to be returned with Form DOC-3098, NDOC’s Improper Grievance  
 10 Memorandum, noting the specific violation. (AR 740.09.3.A, Doc. # 39-1 at 10.) The inmate can  
 11 resubmit the grievance in proper form, but is not given additional time to do so, unless the  
 12 timeframe has expired before the inmate receives Form DOC-3098, in which case the inmate has  
 13 an additional five days from the date the form is received to resubmit the grievance in proper  
 14 form. (AR 740.09.4, B, Doc. # 39-1 at 10.) In fact, if an inmate fails to resubmit the grievance in  
 15 proper form within the prescribed time frame, the inmate is considered to have abandoned the  
 16 grievance. (AR 740.09.4.A, Doc. # 39-1 at 10.)

17        As indicated above, “a failure to exhaust a remedy that is effectively unavailable does not  
 18 bar a claim from being heard in federal court.” *McBride v. Lopez*, --- F.3d. ---, 2015 WL  
 19 3953483, at \* 2 (9th Cir. Jun. 30, 2015). The Ninth Circuit has considered a handful of cases  
 20 where it determined the administrative remedies were effectively unavailable, and where  
 21 exhaustion has been excused. *Id.* In *Nunez v. Duncan*, the court found administrative remedies  
 22 were unavailable “where a prison warden incorrectly implied that an inmate needed access to a  
 23 nearly unobtainable prison policy in order to bring a timely administrative appeal[.]” *Albino v.*  
 24 *Baca*, 747 F.3d 1162, 1172-73 (9th Cir. 2014), *cert. denied*, 135 S.Ct. 403 (Oct. 20, 2014) (citing  
 25 *Nunez v. Duncan*, 591 F.3d 1217, 1226 (9th Cir. 2010)).

26        In *Sapp v. Kimbrell*, the Ninth Circuit found that “where prison officials declined to reach  
 27 the merits of a particular grievance ‘for reasons inconsistent with or unsupported by applicable  
 28 regulations,’ administrative remedies were effectively unavailable.”” *Id.* (quoting *Sapp v.*

1 *Kimbrell*, 623 F.3d 813 (9th Cir. 2010)). As indicated above, the reason for rejecting Plaintiff's  
 2 grievance—that it contained multiple issues—was in fact consistent with AR 740.

3 In *Marella v. Terhune*, the Ninth Circuit found administrative remedies were effectively  
 4 unavailable where the inmate was not given access to the requisite grievance forms within the  
 5 time frame for filing his grievance. 568 F.3d 1024, 1027-28 (9th Cir. 2009). Nor was the inmate  
 6 required to exhaust a remedy he was reliably informed was not available to him. *Id.*

7 In *Albino v. Baca*, the Ninth Circuit held that where a jail did not inform a prisoner of the  
 8 process for filing a complaint after repeated requests, there was no realistically available remedy.  
 9 747 F.3d at 1177.

10 Just recently, the Ninth Circuit recognized that an exception to the exhaustion  
 11 requirement *may* exist where the inmate can demonstrate a threat of retaliation based on both an  
 12 objective and subjective criteria. *McBride*, 2015 WL 3953483, at \* 3 (9th Cir. June 30, 2015).

13 None of these exceptions to the exhaustion requirement applies here.

14 First, contrary to Plaintiff's argument, AR 740 does in fact provide that a grievance may  
 15 be rejected for containing multiple issues. (AR 740.09.2.F, Doc. # 39-1 at 10.) Plaintiff was  
 16 advised of this in the rejection, and acknowledges he failed to resubmit an informal level  
 17 grievance limited to just this issue.<sup>10</sup> He speculates that even if he had resubmitted the grievance,  
 18 Walsh would have rejected it anyway, but there is no evidence of this and this is not a basis to  
 19 find the administrative remedies were unavailable to Plaintiff.

20 To the extent Plaintiff speculates that his grievance would have been rejected if  
 21 resubmitted on the additional basis that he failed to include documented attempts to informally  
 22 resolve the issue because Humphrey would not acknowledge such attempts, this argument is also  
 23 foreclosed. Plaintiff is only required to take the steps held out to him by NDOC in completing  
 24 the grievance process. AR 740 states that attempts at informal resolution “may be accomplished  
 25 in writing *or* in direct consultation with the appropriate staff.” (AR 740.04.2, Doc. # 39-1 at 5  
 26 (emphasis added).) Plaintiff asserts that he did directly consult Humphrey in an effort to

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27  
 28 <sup>10</sup> Notably, the grievance was *not* rejected because of a failure to note attempts to resolve the issue  
 informally, which is the basis of Plaintiff's claim against Humphrey—that he refused to document Plaintiff's attempts  
 to resolve the dispute informally when he knew this was required to complete the grievance process and file suit.

1 informally resolve his issues. That is sufficient under AR 740. He could have gotten written  
 2 confirmation of these efforts, but was not required to do so under AR 740. Therefore, he could  
 3 have proceeded in filing an informal grievance (limited to one issue) which simply described his  
 4 consultation with Humphrey in an effort to informally resolve the matter. He did not do so.

5 Second, Plaintiff asserts that the grievance process was effectively unavailable to him  
 6 because Walsh, who was a subject of the grievance, rejected the grievance as improper for  
 7 containing multiple issues. In other words, Plaintiff contends that allowing Walsh respond to the  
 8 grievance violated AR 740, and therefore made the grievance process unavailable to him.

9 It should be noted that AR 740 provides that “[f]f the person who would normally  
 10 respond to a grievance is the subject of the grievance, the CCS III/AW should respond to the  
 11 Informal Grievance.” (AR 740.05.2.D, Doc. # 39-1 at 5.) Lisa Walsh was the NNCC associate  
 12 warden at NNCC. AR 740 does not contain a provision governing the situation where a person  
 13 who is a subject of a grievance is also the associate warden. Therefore, AR 740 itself does not  
 14 render the grievance process unavailable to Plaintiff. Moreover, the only reason the informal  
 15 level grievance was rejected is because the grievance contained multiple issues. Plaintiff did not  
 16 proceed with filing another informal level grievance limited to this one issue. To the extent  
 17 Plaintiff’s briefing can be read to include an argument that he felt threatened or unable to  
 18 proceed with the grievance process because Walsh was a responder, the court finds this argument  
 19 to be without merit.

20 Plaintiff has not explicitly stated that he suffered a threat of retaliation for grieving this  
 21 issue, but insofar as the court can construe his argument as asserting such a claim, it is without  
 22 merit pursuant to *McBride*. The Ninth Circuit adopted the following criteria for determining  
 23 whether exhaustion is excusable in the context of a threat of retaliation: ““(1) the threat [of  
 24 retaliation] actually did deter the plaintiff inmate from lodging a grievance or pursuing a  
 25 particular part of the process; and (2) the threat is one that would deter a reasonable inmate of  
 26 ordinary firmness and fortitude from lodging a grievance or pursuing the part of the grievance  
 27 process that the inmate failed to exhaust.”” *McBride*, 2015 WL 3953483 at \* 4 (quoting *Hemphill*  
 28 v. *New York*, 380 F.3d 680, 688 (2d Cir. 2004)).

1           Even if Plaintiff could satisfy the subjective prong, he cannot satisfy the objective prong.  
 2       Walsh responded to Plaintiff's grievance by rejecting it as improper because it grieved more than  
 3       one issue. This would not deter an inmate from lodging a proper grievance. In addition, he  
 4       asserts that Humphrey refused to acknowledge his efforts to informally resolve the dispute, but  
 5       as was indicated above, Plaintiff only had to state that he engaged Humphrey in an effort to  
 6       informally resolve the matter; it was not necessary that the efforts be documented in writing.  
 7       Therefore, Humphrey's conduct would not deter a reasonable inmate from lodging a grievance or  
 8       pursing the grievance process.

9           When the court concludes that an inmate has failed to exhaust his administrative  
 10      remedies with respect to a claim proceeding before the court, the claim should be dismissed  
 11      without prejudice; however, in this case, the court also concludes that Plaintiff cannot establish  
 12      actual injury relative to this claim. Therefore, Defendants are entitled to summary judgment and  
 13      not just a dismissal without prejudice as to Count IV.

14           The basis of Plaintiff's claim in Count IV is that he was denied access to the courts as a  
 15      result of Humphrey's refusal to acknowledge Plaintiff's attempts to informally resolve the issue  
 16      so that Plaintiff could complete the grievance process in order to exhaust his administrative  
 17      remedies before filing suit. Nevertheless, Plaintiff still filed an informal level grievance despite  
 18      Humphrey's failure to acknowledge the attempts at an informal resolution. Notably, the  
 19      grievance was *not* rejected by Walsh because Plaintiff failed to document efforts to informally  
 20      resolve the issue, but only rejected the informal level grievance because it contained multiple  
 21      issues. Plaintiff failed to re-file the informal level grievance limited to one issue. There is no  
 22      evidence connecting the rejection of the grievance as improper with Humphrey's conduct, and no  
 23      evidence that Humphrey's conduct was the cause of Plaintiff being unable to bring a claim  
 24      before the court. As such, Plaintiff cannot demonstrate actual injury and Defendants are entitled  
 25      to summary judgment on this claim.

26      **D. Count II**

27           Plaintiff briefly references his claim in Count II, that he was reduced from level two  
 28      status to level three status in retaliation for filing grievances, but then argues that this violated his

1 due process rights. (Doc. # 39 at 53.) Plaintiff was not allowed to proceed with a due process  
2 claim relative to these allegations. (Doc. # 19 at 5-6.) Moreover, Plaintiff does not indicate he is  
3 seeking summary judgment with respect to his retaliation claim in Count II at this time; nor does  
4 he meet his burden for doing so under Rule 56. Defendants also fail to mention this claim in  
5 either of their motions. Therefore, the court will not address this claim at this juncture.

6 **IV. RECOMMENDATION**

7 **IT IS HEREBY RECOMMENDED** that the District Court enter an order:

8 (1) **DENYING** Plaintiff's motion for partial summary judgment (Doc. # 39);  
9 (2) **DENYING** Defendants' Cross-Motion to Dismiss Plaintiff's ADA and RA claims  
10 (Doc. # 75); and  
11 (3) **GRANTING** Defendants' Motion for Summary Judgment as to Counts III and IV.

12 None of the dispositive motions address the retaliation claim in Count II. Therefore, this  
13 matter should proceed with respect to Plaintiff's ADA and RA claims as well as his retaliation  
14 claim in Count II.

15 The parties should be aware of the following:

16 1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to  
17 this Report and Recommendation within fourteen days of receipt. These objections should be  
18 titled "Objections to Magistrate Judge's Report and Recommendation" and should be  
19 accompanied by points and authorities for consideration by the district judge.

20 2. That this Report and Recommendation is not an appealable order and that any notice of  
21 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed  
22 until entry of judgment by the district court.

23 DATED: July 9, 2015.

24   
25 WILLIAM G. COBB  
26 UNITED STATES MAGISTRATE JUDGE  
27  
28